

No. 3610

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOYO KISEN KAISHA et al.,

Appellants,

VS.

CHARLES D. WILLITS and I. L. PATTERSON et al.,

Appellees.

BRIEF FOR APPELLANTS.

KNIGHT, BOLAND, HUTCHINSON & CHRISTIN,
F. ELDRED BOLAND,

Proctors for Appellants.

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In this action libellant sues to recover from respondent damages due to the leakage of cocoanut oil on a voyage from Manila to San Francisco. It was alleged in the libel that the respondent steamship received on board at Manila, in all, 520 barrels of cocoanut oil for transportation to San Francisco; that cocoanut oil is an article requiring stowage in a cool place, and that instead of being so stowed on respondent vessel, it was improperly stowed in a hold (sometimes referred to as tank 5) "immediately adjoining the engine room", and "that by reason of said improper stowage and said negligent care of said cargo, said oil was caused by said heat to liquefy and to escape from the barrels in which the same was contained." (Apostles pp. 7-10.)

It is also alleged that after so escaping the respondent steamship failed to save the same. (Apostles pp. 7-10.)

The bills of lading acknowledge receipt in good order and condition, but contain an exception as follows: "*leakage of contents at owner's risk*". (Apostles p. 22.)

It promptly developed at the trial that the coconut oil was already in liquid state when placed on board the vessel at Manila (Apostles p. 78), by reason of the ordinary temperature there prevailing, and that by reason of the ordinary temperature of the air it must so continue for the greater part of the voyage. It was obvious, therefore, that the libel could not be maintained without amendment (Apostles p. 157), and over the objection, and subject to the exception of respondent, the words "by said heat to liquefy and" were stricken out. (Apostles pp. 30, 157.)

It also appeared at the trial that a large portion of the cargo was not shipped in tank 5, "immediately adjoining the engine room", but was in an entirely separate hold further aft, referred to as hold 7.

The points at issue are, therefore, as we view them, first, the sufficiency of the containers, and, second, the alleged negligence in stowage.

It is, of course, fundamental that a carrier is not ordinarily liable for loss or damage to merchandise due to defective containers.

Carver's Carriage by Sea, 5th Ed., Sec. 14:

“Again, the carrier is not usually liable for loss which results from the defective manner in which the goods are packed; or from defects or insufficiency of the packages which contain them. With such cases, as also where goods are shipped in an unsound or unfit condition, it may be said that the loss has resulted from the inherent defects of the goods themselves. Moreover, where goods are improperly packed, there is a negligence on the part of the shipper of his implied duty to be reasonably careful in shipping them, ‘and no person is entitled to claim compensation from others for damages occasioned by his neglecting to do something which it was his duty to do.’”

Ordinarily, of course, the burden of proof is upon the carrier to show that the damage was due to the condition of the containers, or that the damage occurred by reason of the inherent quality of the merchandise itself.

Nelson v. Woodruff, 66 U. S. 156; 17 L. Ed. 97.

This, however, is not the case where the claim itself demonstrates that the damage is incident to some cause which is excepted in the bills of lading.

“The Folima”, 212 U. S. 354; 53 L. Ed. 546.

The idiosyncrasies of cocoanut oil and other non-viscous fats with reference to their containers are well known. They have been the subject of judicial observation on numerous occasions from an early day.

In

“The Dunbritton”, 73 Fed. 352,
the court says (p. 363):

“Undoubtedly Ceylon (cocoanut) oil, partly by reason of its inherent quality, and partly because

of bad cooperage, always leaks greatly from the casks.”

And Judge Adams, in

“The Claverburn”, 147 Fed. 850,

says (p. 852):

“The testimony so far shows that this kind of oil possesses drying qualities, and has a tendency to shrink the barrels, to render the wood brittle, *and almost invariably causes the barrels to leak and drain heavy when carried in large shipments.*”

And the Supreme Court in

Nelson v. Woodruff, *supra*,

discusses the subject at length with reference to lard oil:

“When the contents of such barrels are solidified, the leakage will be small; when liquified, large.
* * * From its liquidity, the ordinary barrels for the transportation of tallow and grease were found to be insufficient, as the casks were frequently half empty on their arrival. The commerce in it was checked for some years, and not resumed until the shippers put it into square boxes lined with tin, and the article is now carried without loss. * * * We have now shown that a cause of the leakage of lard is its liquefaction under temperatures higher than those at which it will solidify, when deficient in stearine. One legal consequence of this fact is that *shippers of that article should be considered as doing so very much as to leakage at their own risks when it is in a liquid state*, however that may have been caused, either from fire or the heat of the sun, and knowing, too, that it was to be carried by sea at a time from places where there was a high range of heat, through latitudes where the heat would not be less, until the ship had made more than three-fourths of her passage.”

The testimony in this case confirms the foregoing. The witness Murray, a marine surveyor, testified that the oil itself caused a shrinkage in a wooden container. (Apostles p. 105.)

“Q. In all this observation, did you observe and form any conclusion as to what effect, if any, cocoanut oil would have upon a pine barrel?

A. Well, I don't know as it is any difference in the effect on a pine barrel or hardwood barrel.

Q. What is the effect, if any?

A. The general result is there is shrinking.

Q. The oil itself causes the shrinking?

A. The shrinking of the container.”

Captain Curtis, one of the best known surveyors in the port, said (Apostles p. 113):

“Q. Have you formed any opinion, by reason of your experience, of the effect, if any, of cocoanut oil upon a pine barrel?

A. Yes, I have formed the opinion that cocoanut oil shrinks pine barrels.”

And again (Apostles p. 284):

“A. I do not know of any wooden barrel that will hold cocoanut oil that I would guarantee would hold cocoanut oil on an under-deck vessel across the Pacific.”

McCarthy, an old experienced dockman says (Apostles p. 125):

“Q. Did you ever see cocoanut oil unloaded before?

A. I did with the Pacific Mail.

Q. Did you ever see a perfect shipment?

A. No. I saw one shipment come out of the Pacific Mail boats as bad as this shipment, every bit as bad, and every other shipment there was more or less leakage.”

The explanation of the causes of this shrinkage and leakage was furnished by Mr. Sanborn, a chemist, as follows (Apostles p. 120):

“Q. You have heard the testimony that oil containers shrink, wooden barrels, pine barrels?

A. I have.

Q. From your chemical experience, Mr. Sanborn, can you give us any information as to why that could occur, if it does occur?

A. All barrels in a commercial condition, so to speak, that is, as they would be met with in commerce, have more or less water in the wood fibre, and water in contact with cellular material of all kinds tends to swell it; there is a quasi-chemical combination takes place there, so that the volume of the whole is much greater than the sum of the volumes of water and wood separately; that combination does not take place in the case of oil, and consequently when the water of a wood is driven out by one cause or another and is replaced by oil, there will be shrinkage. In other words, the sum of the volume of the oil and the volume of the wood would practically represent the volume of the two in combination.

Q. And there is an apparent shrinkage?

A. Yes.”

In view of the foregoing, the significance of the amendment to the libel will now become apparent. It will be remembered that the original libel alleged that the oil was negligently stowed in hold 5, immediately aft the engine room, a place of alleged excessive heat, and that “*said cocoanut oil was caused by said heat to liquefy and to escape from the barrels in which the same was contained.*” If that had been the fact, a substantial question might have been presented to the court, whether in view of such fact the exception

against leakage contained in the bill of lading would be effective; but such is not the fact. The cocoanut oil was put on board at Manila in a liquid state, during the hottest period of the year.

T. Ota said (Apostles p. 210):

“A. I cannot give you the degrees of heat, but it was the hottest season of the year.”

Then reading from the log-book:

“A. On July 8, that is, the date of sailing from Manila, was 87°.”

Between the 8th and the 31st of July (as the testimony on this point shows, Apostles p. 211) the temperature varied from 94° down to a minimum of 75°, with the average in the eighties.

Cocoanut oil becomes solidified at about 65°. (Sanborn, Apostles p. 121.)

Immediately it became obvious that the cocoanut oil did not become liquid by any act of respondents, but, on the contrary, was liquid when put on board, and remained liquid by reason of natural heat; it necessarily followed that the libel must fall.

We do not make so much a point of the amendment of the libel and the exceptions thereto (Apostles pp. 30, 157) as to emphasize the fact that libellant's damage was caused by natural heat and their own negligence in not providing sufficient containers in the light of this circumstance.

This testimony falls directly in line with the observations of the Supreme Court in *Nelson v. Woodruff*,

supra. The parallel of the two cases is remarkable. In the Nelson case the oil was put on board in a liquid state at the hottest period of the year. The testimony in that case shows that the lard, when liquid, did shrink the barrels and escape. The court there held that even in the absence of an exception in the bill of lading as to the damage by leakage, that there could be no recovery.

So much for deductive argument. Let us approach the case from an empirical standpoint. The testimony describes without contradiction that some of the barrels came off the ship full, some half empty, and some empty. *This must prove instantaneously and conclusively that those barrels which were full were of sufficient strength, those which were half full were only partly sufficient, and those which were empty were insufficient.*

Dunn, witness for libelant, testifies (Apostles p. 290):

“Q. Did you go up alongside the barrels as they came out of No. 5 tank?

A. Yes.

Q. Some of them had the heads stove in?

A. Yes.

Q. There were various conditions of fullness?

A. Yes.

Q. Some empty, were they?

A. *Some empty.*

Q. Some half full?

A. *Some half full.*

Q. *And some full?*

A. *Exactly.”*

Barry testifies (Apostles p. 129):

“Q. What was the condition of the barrels that came out of No. 5?

A. They were pretty nearly the same as No. 7, all leaking.

Q. All leaking?

A. Yes.

Q. Some empty?

A. Some empty, yes.

Q. And some full?

A. Some full."

Witness Chapin testifies (Apostles p. 99):

"Q. The condition was substantially the same?

A. All down the line, yes.

Q. Some barrels were full?

A. *Some barrels were full.*

Q. And some empty?

A. *Some empty, some partly empty."*

The inevitable inference is that the barrels which came off full were sufficient, and that those which came off empty or partially empty were insufficient.

So as not to rely only upon even an inevitable inference, however, the witnesses testify to the same effect.

Captain Curtis testifies (Apostles p. 282):

"Q. If a cargo of cocoanut oil comes out of holds 5 and 7, some with the barrels full, some empty, and some partially full, what does that indicate, in your mind?

A. That some of the containers were not good enough."

And again, Witness Murray testifies (Apostles p. 278):

"Q. Assume, Mr. Murray, that the cargo of cocoanut oil stowed in barrels in both hold 5 and hold 7, some of them came out empty, some partially empty, and some full, what explanation would you give for that? * * *

A. That the barrels that retained their contents possessed sufficient strength for the purpose for which they were intended, and those that did not retain their contents lacked the strength. * * *

That the barrels were found there, some partially full, others empty, and others apparently entirely full, in my opinion, is evidence that some of the barrels contained the requisite strength in all parts, some of them only in parts, and some of them lacked the strength where they needed it most."

Without the exceptions noted in the bill of lading therefor, we believe it conclusively established, both deductively and empirically, that the barrels were insufficient in strength, in view of the peculiar character of the commodity. This would be so even though the burden were upon the respondent to prove the insufficiency of the containers, but where the bill of lading contains an exception of damage by leakage, then the result simply is that the libelant has not sustained the burden.

In view of what we have just said, discussion of negligent stowage would seem to be entirely supererogatory. The fact that some of the barrels came out full necessarily conclusively establishes the fact that the stowage was sufficient, provided the containers were sufficient. This inference is also substantiated by testimony.

Captain Curtis testifies (Apostles pp. 282, 285):

"Q. Will you then say that despite the fact that there was no ventilation in No. 5 tank, and that it was air-tight, it is a good place for the stowage of cocoanut oil?

A. If the containers are good enough to carry it, it will carry it in No. 5 tank, in No. 7 tank, in No. 1 hold—if it is a good container it will carry the oil; if it is not a good container it will leak wherever you put it. * * * I do not think that the fact that it was in No. 5 tank had anything to do with the leakage. * * * No, I think No. 5 tank is all right to stow cocoanut oil in provided the containers are good.

Q. Despite the fact that it has not any ventilation or air?

A. It does not make any difference if the container is good. * * * Good enough to hold its contents. * * *

A. I think if the containers, the wooden barrels, are thoroughly seasoned, and are in good condition, tight, when they go on board the vessel, you can just as properly stow them in No. 5 tank as any other part of the vessel.

Q. Without any air?

A. Without any air.

Q. Without any ventilation?

A. I am taking into consideration all of the conditions of No. 5 tank when I say that."

We have, however, positive proof from libelant's own witnesses that the stowage in tank 5 was sufficient for the purpose. As already remarked, it was early discovered that a portion of the cargo was stowed in hold 7. Libelant's own witnesses testified that stowage in hold 7 was good and sufficient stowage.

Rinder, libelant's witness, testifies (Apostles p. 56):

"A. No, No. 7 hold is all right for stowing anything of that sort."

Captain Brown, also called for libelant, testifies (Apostles p. 90):

“Q. Would hold 7 be a suitable place, do you think, for cargo requiring ventilation?”

A. Yes, because it has ventilators in there leading through.”

Now, as a matter of fact, the barrels coming from hold 7 were in the same condition as those coming from hold 5, that is to say, some were full, some partially full, and some empty. The inevitable inference is that if hold 7 was good stowage, as testified by libelant’s witnesses, then hold 5 was likewise good stowage. The stevedores who discharged the cargo testified that the condition of the oil coming from each hold was the same.

McCarthy testifies (Apostles p. 124):

“Q. What was the condition of the oil as it came out?

A. It was in very bad condition.

Q. Out of 5, was it?

A. Yes, out of both hatches, in bad condition.

Q. Out of 7, too?

A. Yes.”

Barry testifies (Apostles p. 129):

“Q. What holds were they in?

A. No. 5 and 7, 5 tank and 7 hold.

Q. What was the condition of the barrels that came out of No. 5?

A. They were pretty near the same as No. 7, all leaking.

Q. All leaking?

A. Yes.

Q. Some empty?

A. Some empty, yes.

Q. And some full?

A. Some full; the hoops were loose on them; we used to hammer the hoops down with our hooks.”

In other words, we simply establish the fact that the leakage of cocoanut oil from pine barrels is not a matter of stowage at all, but a matter of the containers and the commodity itself. That is to say, as the Supreme Court remarks, it can not safely be shipped commercially except in tin-lined barrels, or, as was remarked by Judge Adams in "The Claverburn", in metal drums.

It is also claimed by libelant that, after leaking, the oil ran into the scuppers and then into the bilges, and that it could be thence reclaimed. It seems unnecessary to go into this subject elaborately. The evidence establishes that the oil did go from tanks 5 and 7 to No. 10 bilge (Apostles p. 267), and that there was no place between tank 5 and the bilge where the oil could be plugged (Apostles p. 268), nor could the oil have been reclaimed after it reached No. 10 bilge, for the pumping of the bilges could not be stopped (Apostles p. 270). As a matter of fact the leakage of the oil was not discovered. It is claimed that it might have been discovered by sounding the bilges, but the fact is that the engine room oil drained into the same bilges (Apostles p. 269). Therefore the sounding rod would necessarily show oil (Apostles p. 270), and this engine room oil could not be distinguished from cocoanut oil (Apostles p. 264).

We respectfully submit, therefore, first, that the burden was on libelants to establish the sufficiency of the

containers; second, that the very fact that some of the containers retained the oil, while some did not, proves that those which did not were insufficient; third, that stowage in hold 5, according to libelant's own witnesses, was proper stowage; and fourth, that there is no evidence that the oil could have been reclaimed at any point.

Dated, San Francisco,
February 19, 1921.

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